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ENVIRONMENTAL LAW IN MALAYSIA

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ENVIRONMENTAL LAW IN MALAYSIA: A SURVEY

by
Nik Abdul Rashid
University of Malaya

Japan Center for Human Environmental Problems
and
Hokkaigakuen University
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THE ENVIRONMENTAL LAW IN MALAYSIA:

A SURVEY

INTRODUCTION

"Why must there be law to regulate and control our environment?", asked a naive first year law student.

"It reflects man's dissatisfaction with what he is doing to exploit the natural resources to such an extent that it endangers his own environment," came a prompt reply. "It reflects an increasing awareness that the quality of life is deteriorating as a result of no planning or lack of planning in regulating our day-to-day affairs and in the exploitation of our natural resources," came another reply. The answers to this simple question never ends. Hundreds of books have been written on the topic. Conferences, seminars, workshops and symposium have been organized on the topic from time to time, yet there is no simple answer to the simple question.

The next question to be asked is, "Is the law adequate to protect ourselves and to ensure that our children will have a place under the sun?" Still, there is no simple answer to this simple question.

Robert Arvill in Man and Environment, summaries the reasons for our inquiry in the following terms:

"From primitive times man has been making an assault on his environment with fire, water and tools. Until a century or so

ago, this attack took place over limited areas and in most cases at a relatively slow pace. Today there is a danger that man may use up the habitable and cultivable land. His activities increasingly outstrip the capacity of natural processes to restore the fertility of the land and water which has taken thousands of years to create. And through errors and misuse of his powers he is running or degrading vast areas of the globe..... The great driving force behind this new fierce assault on the population explosion....."

This paper does not seek to discuss environmental issues in toto, for environmental problems know no frontiers. This paper, however, will attempt to focus on the legal aspect of environmental protection in Malaysia and to assess whether adequate measures are being taken by the government in overcoming environmental problems.

¹ Robert Avril, Man and Environment, Suff lk, Penguin (1976), p. 13.

THE LAW

Law must be viewed as an instrument in perserving society, in resolving acute social conflict, in promoting social order, in promoting nation building and preserving our national heritage, and to regulate and control our destiny. Viewed as such, the law on environmental protection must provide some form of guarantee and to ensure that we have the right to live and the future of our generation will be safeguarded.

At present there are various sets of laws governing environmental quality in Malaysia, some dated back to colonial days. For purposes of this paper, we may divide this into two categories; laws directly controlling the exploitation of natural resources, thereby indirectly controlling environmental quality, and secondly, laws directly and specifically controlling environmental quality.

It is to be noted that most of the pre-merdeka legislations concerning the exploitation and utilization of natural resources have been productive and revenue oriented. It is to be understood that the colonial masters were not interested in the devleopment of natural resources in the colonies, but the British imperialists were interested in getting as much and as quickly as possible all the natural resources out of the colony at minimum cost.

A. Legislations Governing the Exploitation of Natural Resources

1. Mining Enactment

The Mining Enactment provides for licensing requirements, control over use of land and machineries, payment of royalty, fees, premiums and rents and other administrative provisions. There is no provision concerning wastage, depletion or resource conservation, although there are some provisions on environmental quality.

It deals specifically with mining operations, and since mining operations inevitably affect the environment, particularly rivers, streams and adjoining lands, provisions are made to safeguard the environment against mismanagement and uses detrimental to the economy of the nation. In relation to mining operations, it deals specifically with the use of waters. It prohibits the unauthorized use of river waters for mining purposes, the alteration of river banks, the use and employment of certain water-based mining techniques, and most important provision relating to environment is the obligation on the part of mining operators to keep the water pure.

2. Waters Enactment

This enactment deals exclusively with matters relating to rivers and streams. It regulates and controls the use of rivers and streams, and imposes rigid prohibitions against the use, unauthorized use of rivers and streams, the alteration and diversion of river banks and

river courses. Felling of trees into rivers is prohibited. This is done with the objective of preventing the blockage of river waters and possible pollution of these waters.

3. Forests Enactment

At present each state pursues its own policy in forestry. There are nine different sets of forest laws in Malaysia which have undergone a combined total of 40 amendments since their introduction. This confusion is largely a historical legacy. Unlike mining products, the British were not interested in timber products, presumably logs from African colonies were of better quality, cheaper and easier to transport to Great Britain. As such there was no attempt to rationalize forestry laws.

Environment-wise, the Forest Enactment deals in matters relating to the preservation of forests, logging and licensing of operations connected with forest industry. The enactment contains several provisions relating to environment and pollution, which prohibits the use of poison, or dynamite for purposes of hunting and fishing in forest reserves.

4. Land Conservation Act, 1960

This Act attempts to conserve lands on the hill and protect soil erosion and inroads of silt. It prohibits the earth, mud, silt or stone from a piece of land to cause damage to other land. It also prohibits interference of any water course, whether natural or artificial through cultivation. For purposes of preventing silting and erosion, the owner is required to build dams, retaining holds, drains and water courses.

5. Street, Drainage and Building Act, 1974

The main object of the Act is to empower local authorities to regulate and control the development, building and construction and proper maintenance of street, drainage system and buildings. There are specific provisions on environmental and pollution control- some of the provisions are incidental to that objective, through rigid control and proper maintenance, while others are specific. For example, it imposes an obligation on the owner or occupier of houses abutting private streets to clear the rubbish, dust, ash and filth of any sort. Any industrial effluents should not be discharged or allowed to communicate with any river, canal, stream, lake or sea.

6. Town and Country Planning Act, 1976

The Act imposes a statutory obligation on the local planning authority to ensure that the physical and environmental characteristics of that area are complied with. The Act also requires the local authority to adhere to the "current policies in respect of the social and economic planning and development and the environmental protection of the state and the nation." (Sec. 8(4)).

B. The Environmental Quality Act, 1974

The most recent piece of legislation concerning the environment which attempts to regulate resource conversion so as to minimise damages to the environment is the Environmental Quality Act, 1974.

Recognition for environmental preservation and the need to maintain an acceptable quality of life has been given official status in the Third Malaysian Plan. The Plan envisages and recommends, "Environmental improvements and protection will receive the full attention of the government in planning and implementation of programmes in the Third Malaysia Plan. It is vital that the objectives of development and environmental conservation be kept in balance, so that the benefits of development are not regated by the costs of environmental damage."²

The Plan therefore envisages a National Environmental Policy which will take into account the following factors:

- (i) the impact of population growth and man's activities in resource development, industrialisation and urbanisation have on the environment;
- (ii) the critical importance of maintaining the quality of the environment relative to the needs of the population, particularly in regard to the productive capacity of the country's land resources in agriculture, forestry, fishing and water;
- (iii) the need to maintain a healthy environment for human habitation;
- (iv) the need to preserve the country's unique and diverse natural heritage, all of which contribute to the quality of life; and
- (v) the interdependence of social, cultural, economic, biological and physical factors in determining the ecology of man.

²Third Malaysian Plan, Government Printers, K.L.
Chap. XI, para. 661.

The Environmental Quality Act, 1974 will therefore be instrumental in bringing about a concerted and gradual progression towards achieving this objective. This Act contains six parts:

Part I deals with definitions followed by Part II which deals with administrative provisions.

Part III and IV provide for licensing and general prohibitory clauses.

Part V deals with provisions for appeal against the decision of the Authority set up under Part II and Part VI deals with penalties and prosecution.

Part I: Definitions and Interpretations

The most important term that must be understood are the followings:

a) beneficial use - means a use of the environment or any element or segment of the environment that is conducive to public health, welfare or safety which requires protection from the effects of wastes, discharges, emissions and deposits;

b) environment means the physical factor of the surroundings of the human beings including land, water atmosphere, climate, sound, odour, taste, the biological factor of aesthetics;

c) pollutant means any substance whether liquid, solid or gas which directly or indirectly,

(i) alters the quality of any segment or element of the receiving environment so as to affect any beneficial use adversely or

ii) is hazardous or potentially hazardous to health.

d) Pollution means any direct or indirect alterations of the physical, thermal, chemical, biological or radio active properties by any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use of adversely, to cause a condition which is hazardous to public health, safety, or welfare or to animals, birds, wild life, fish or aquatic life or to plants or to cause a contravention of any condition, limitation, or restriction to which a licence under this Act is subject.

e) Wastes includes any matter prescribed to be waste and any matter, whether liquid, solid, gaseous, or radio active, which is discharged, emitted or deposited in the environment in such volume, composition or in such manner as to cause an alteration of the environment.

Part II: Administration

Section 3 provides for the appointment of a Director-General of Environmental Quality. The duties of the Director-General are exhaustively enumerated in this section. These duties covers a wide range of activities.

He is responsible for the administration of the Act and regulations; he is to coordinate all efforts to prevent pollution; he is to recommend to the Minister the environmental protection policy and other measures to be also responsible to control issue of licenses; coordinate research works and surveys, to collect and disseminate information to public in order to educate them and to recommend to the Minister amendments to the law. The Minister may also appoint, Deputy Directors-General in such number as necessary to implement the Act.

Section 4 provides for the establishment of the Environmental Quality Council whose duties are advisory only. The composition of the Council is quite representative of all relevant bodies concerned with environmental protection. Several Ministers are represented. Other representatives include one each from the manufacturing industry, the petroleum industry and the academic circle. The Director-General of the Environmental Quality is not represented.

It would be more desirable to achieve uniformity and coordination that the Director-General be given an ex-officio status or made a permanent member of the Council.

Part II: Licensing

The licensing machinery has been and still is the most popular device for controlling and regulating industrial and economic activities. The various enactments have placed great reliance on this device.

The Act provides that the Director-General will be the licensing authority and that the licence will generally last for one calendar year, after which it is renewable. The issue of licenses will be subject to the Director-General's discretion as to conditions to be attached to the licence.

The Director-General has also the power to vary conditions in a licence and before doing so he must have regard to the practicability of the existing equipment being adapted to conform to the new varied conditions, the life expectancy of the existing equipments, the quality or degree of cutback of emission, waste or deposit to be achieved by the varied conditions, the cost of meeting with this varied condition and the size of the trade and industry concerned.

Section 17(2) provides that fees may be prescribed, according to anyone or more of the following factors:

- a) the class of premises,
- b) the location of such premises,
- c) the quality of wastes discharged,
- d) the pollutants or class of pollutants discharged,
- e) the existing level of pollution.

This provides for discriminatory fees to be charged with due consideration of the relevant factors. For instance, an industrial activity which is known to pose an environmental threat and located in the vicinity of an agricultural area would be charged a high fee, taking into consideration the fact of the regularity of emissions of effluents into the river and streams and rendering them less valuable for agricultural purposes. The fees will be made high enough, and the level of permissible pollution would be very low indeed. These two factors will encourage the operations of such activity to install waste treatment equipments.

Part IV: Prohibitions Against Pollution

This point seems to introduce the concept of permissible level of pollution.

Section 21 of the Act provides that the Minister may, after consultation with the Council, specify the acceptable conditions for the emission of noise into any area, segment or element or any element of the environment within which the emission, discharge or deposit is prohibited or restricted.

This section actually contains two points. The first point deals with the prescription of standards - minimum eco-standards - the level of permissible pollution, beyond and over which, pollution becomes an offence.

The second part deals with absolute and conditional restrictions in relation to certain areas. One such example would be the rise of industries (particularly, palm oil mills) in the vicinity of catchment areas.³

These areas will be described as absolutely free from any activities that may pollute or the industries in these areas will be subject to stringent conditions and very high fees.

Where industries do not have the capability or the technology to meet the standards prescribed by the Minister under Section 21 then it will have to be licensed to emit or discharge greater volume of wastes or noise (Section 23, 24 and 25). This method adopted by the Act to bring all economic activities that affect the environment within its orbit is by the device of 'prescribed premises'.

Section 18 provides that the Minister after consultation with the Council may by order prescribe the premises, the occupation or use of which by any person shall, unless he is the holder of a licence issued in respect of premises, be an offence under this Act.

The object of this section is to encompass each industry stage by stage. For instance if it is established by facts and evidence that most damage to riverine resources

³ Information gathered from interview with a senior officer of the Dept. of Environment Mr. Godwin Singam.

then the Minister may prescribe that all premises carrying out oil palm milling will be considered as prescribed premises. This automatically brings the licensing requirement into play. Through the licence, relevant controls are exercised. The only defect in this section, it would appear is the drafting. The section envisaged the licensing of prescribed premises, non-compliance of which will be an offence but the clause "unless he is a holder of a licence issued in respect of those premises", appears to give the impression that it could be a licence under any other laws, probably a licence by other authority pertaining to the occupation, use or control of that premises, whereas what is contemplated and intended is a licence under the provisions of the Environmental Quality Act.

Section 26, 27 and 28 deal with the discharge and spillage of oil into Malaysian waters or into areas outside the Malaysian territorial waters if such discharge result in the oil being washed into Malaysian waters. Section 28 provides for several defences to a charge of an offence under Section 26 and 27.

Finally, section 33 provides for the prohibition of mass pollution. Where several persons are licensed to emit or discharge wastes into the same segment of environment, each is complying with the condition, but nevertheless the collective effect of the aggregate of such waste is likely to cause pollution, the Director-General may require each licensee to abate such emission or discharge. This section envisages collective responsibility on the part of licensees. It is innovative and far-sighted, for each industry should be blamed for contributing in a small way to the pollution.

A COMMENTARY ON THE PRESENT LEGISLATIONS

A. Constitutional Problem

Being a Federal State, Malaysia is faced with a constitutional problem, whether environmental control is a Federal or State matter? The United Nations Task Force on Human Environment recognized three distinct views on the problem.

1. The vesting in the state governments of substantial authority over land, water, forests and mines presented an insuperable obstacle to making real progress on the environmental front. As such the Federal Government has no real power to control the enforcement of soil conservation measures, water quality restrictions in respect of mining operation and other activities significant to environment.

2. Since cooperation between the Federal Government and State Government has been extremely good, the legal distinction between Federal and State powers does not accurately reflect political reality. This is more so because both Federal and State governments are controlled by the same political party.

3. Of the two views, the middle path seems to provide the answer to the problem. Although cooperation exists between the Federal and State governments, and the states often follow the lead of the Federal government in enacting new legislation, on record the State government has not been effective in the control of environment, in

that effluent standards has been generally too lenient and often ignored. As such, the Federal Government must take the lead in enacting state legislations if necessary under Article 76(4) of the Federal Constitution which empowers the Federal Parliament to enact laws for the state "to ensure uniformity of laws and policy".

B. Enforcement Problems

Legislation is one thing, enforcement of that legislation is another. We may have flawless laws beautifully worded with an excellent organizational set up, yet at the same time we have pollution at every nook and corner of our homes and cities. If such beautiful legislation is not backed up by effective enforcement, it is better not to have any legislation at all.

Being new in the field of environmental quality, Malaysia is seriously handicapped by the lack of officers. As on 31st January 1977, there are only nine officers in the Environmental Division of the Ministry of Science, Technology and Environment. These are-

Director-General of Environment	1
Director of Environment	2
Assistant Directors	3
Enforcement Officers	3
Total	<hr/> 9

How do we expect nine officers to combat pollution created by 12 million people, 2,500 industries and 35,000 corporations? It is a mission impossible. It is submitted that more officers should be added to the establishment, so that at least one officer is located in

each state to head the state Department of Environment to be assisted by one officer per every 100 industries.

In addition there should be adequate staffing at the headquarters. If this proposal is accepted, then the Department of Environment will have a compliment of 58 officers, made up from the following-

Headquarters	Let us say	20
States		13
Enforcement Officers		25
Total		58

Let not adequate number of officers be taken for granted that there will be no pollution, once we have a full compliment of 58 officers. What is needed is enforcement, adequate enforcement of the law.

C. Attitudes of the Government

The attitude of the Malaysian government or any government at all, is such that it never likes pressure. To put it the other way round, it is not responsive to public opinion. It is only after the July 1978 General Election that the Prime Minister came up with a new form of government - "A responsive responsible government of the people". It is too early to predict how responsive and effective is the government of the people. In the past, the cry of the Malaysian people in the following circumstances have passed deaf ears.

1. The Kuala Juru's Battle for Survival (Consumers Association of Penang, 1976 Publication).

2. Endau-Rompin Tregerdy, wherein 30,000 acres of virgin forests gazetted as wildlife park have been massacred by indiscriminate logging.

3. The Sultan of Selangor's Anger on the Dirty Klang Royal Town.

4. The Malaysian Environmental Protection Society's Battle for Clean Air in the cities and on the roads.

These are but four examples of inadequate enforcement or non-enforcement.

However, the Malaysian government must be congratulated on the concorde supersonic ban. Otherwise, we not only have pollution on the land, roads, rivers and streams but also up above in the sky.

D. The so-called "Dilemma"

Some greedy industrialists and "get-rich-quick" millionaires have often argued that strict implementation and enforcement of our legislations on environmental quality will conflict with our goal of industrialization and development. Over and above, it will shun away potential investors because rigid enforcement will cause great hardship to the industries concerned. Furthermore, the high cost of rigid control will be passed back to the consumers in the form of additional costs to the goods they purchased. The argument seems to be fallacious for development and pollution control are complimentary to each other. We must recognize the fact that limitations have been imposed on our natural resources, the vulnerable nature of our tropical ecosystem, progressive industrial development, made conservation of our environment a vital necessity. We must also recognize the fact

that clean and litter-free Malaysian towns would attract both investors and tourists, and would raise the national morale and civic pride.

Like Singapore Government, the Malaysian Government must have a conviction that "industry has a role to play in safeguarding the environment since they, as a group, formed one of the worst culprits responsible for pollution. Profit could not be seen as the end-all and be-all of their activities. Rather, they owned a social responsibility to channel part of their technological and financial resources towards the control of pollution and protection of the environment!"¹

Physical development with per capita income runs to thousands of dollars would be meaningless if half of our population are sick due to inhalation of black smokes in the road, drinking polluted water and what have we, and the other half are not healthy. Physical development would be more meaningless if we were to cut our trees now and sell them at "cheap sale" price only to import back in ten years' time at a very exorbitant rate. It would be more meaningless if we were to destroy our jungles now only to send our children to the forests of Africa to see for themselves what a tiger or an elephant is.

¹ Lee Tien Tien, Law and the Protection of the Environment, Faculty of Law, University of Malaya, Project Paper, 1976, p. 95.

Life would be more meaningful if we can have a balanced diet, live in moderate buildings, travel in comfort, enjoy the mother-nature's gift of rivers and mountains full with "beautiful people" than to live in noisy cities with fumes, smokes and gases, looking into the barren field prostituted by the so-called development.